

MICHIGAN SUPREME COURT REINFORCES CONTRACTUAL INDEMNITY RIGHTS

Construction Law Practice Group

December 8, 2008

The Michigan Supreme Court recently struck a major blow to the so-called "only named defendant" argument through its ruling in *Lanzo Construction Co. v Wayne Steel Erectors*, 477 Mich 854; 720 NW2d 754 (2007).

The significance of this case is two-fold. First, in situations where an indemnitee is the only defendant in an underlying personal injury action, the indemnitee may settle the underlying lawsuit without losing its right to pursue indemnity claims against non-parties who may share some comparative negligence.

Second, a potential indemnitor may not escape its indemnity obligations by asserting that its indemnitee was "solely negligent" simply because the indemnitee is the only defendant named in an underlying personal injury action. In the contractual indemnity context, *Lanzo* can be used as both a shield and a sword to enforce indemnity obligations.

Contractors understand there are significant, inherent risks on every construction project. As a precautionary measure, there are basic contractual devices used to manage risk such as indemnification agreements, which transfer risk from one party to another.

They are typically encountered in construction contracts between owners and general contractors, or general contractors and subcontractors. It is quite common in construction contracts for the parties to include indemnity provisions requiring one party to indemnify the other for certain losses and expenses incurred on the project.

Michigan is an "intermediate form" indemnity state, meaning that a party may receive indemnity, except when the personal injury or property damage was caused by its sole negligence.

Indeed, the Michigan Legislature has long since statutorily prohibited agreements as void that purport to provide indemnity even if a party is solely negligent against public policy. Specifically, the legislature recognized the dangers associated with permitting small subcontractors and suppliers to indemnify, or be held to provide indemnity for, larger portions of construction projects than would be fair and equitable.

Perhaps the classic example of a construction loss situation in which an indemnity agreement comes into play is an action brought by an injured construction worker against the general contractor of a construction project.

For example, suppose that a contract between a steel erector and a general contractor contained an indemnity provision whereby the subcontractor agreed to hold the general contractor harmless from any and all claims arising out of the subcontractor's work, except where the injury or damage was caused solely by the negligence of the general contractor.

Assume that while the steel erector subcontractor is performing its work, one of its employees falls and is seriously injured because he was not wearing fall protection.

Under Michigan's workers' compensation scheme, the injured employee's exclusive remedy against his employer is limited to recovery of medical expenses and lost wages. In order to recover damages for future wage loss, pain and suffering, etc., the injured subcontractor employee sues only the general contractor. Now, under the indemnification provision, the general contractor would be entitled to contractual indemnity from the subcontractor because the injured employee's claim arose out the subcontractor's work (i.e., erecting the steel).

Oftentimes, a potential indemnitor such as a subcontractor attempts to shirk its indemnification obligations by arguing that the general contractor was solely negligent and, therefore, it does not owe indemnity because the general contractor is the only named defendant and all of the allegations in the complaint are against the general contractor.

In *Lanzo*, Lanzo Construction was the sole defendant in an underlying action filed by Fernando Agueros, an employee of Wayne Steel Erectors. Agueros, an ironworker, misjudged the distance to a column and fell when the leading ends of the rebar he was carrying struck the column.

Lanzo tendered its defense to Wayne Steel pursuant to a contractual indemnity agreement in their subcontract, but Wayne Steel refused to defend and indemnify Lanzo in Agueros' lawsuit. Lanzo then settled the *Agueros* case and filed an action against Wayne Steel for contractual indemnity to recoup the significant amount of money it paid to Agueros and expended in defending the case.

At the trial court level, Wayne Steel successfully contended that since Lanzo was the only defendant in the Agueros case, and since all of the allegations in the Agueros complaint were directed at Lanzo, Lanzo's settlement with Agueros was based exclusively upon Lanzo's "sole negligence."

When it reviewed the case, the Michigan Court of Appeals concurred with the trial court's conclusion that Lanzo was seeking indemnity for liability based on its sole negligence.

Lanzo appealed to the Michigan Supreme Court, which, rather than granting leave to appeal, summarily reversed the appellate court on the indemnity issue. The high court stated that Fernando Agueros, the plaintiff in the underlying injury action on which Lanzo sought indemnity, had a duty to proceed with reasonable caution for his own safety.

At his deposition, Agueros admitted that he misjudged the distance to the column when he swung the rebar around that he was carrying. Therefore, Agueros' negligence was at least partially responsible for his accident, so Lanzo could not have been solely responsible for Agueros' accident.